on behalf of his father who was mentally deranged, that a registration officer had gone to the appellant's house to register him but that owing to the appellant's condition had been unable to do so.

The Registration Officer also stated that in his view the appellant did not understand the plea of guilty he was alleged to have made at his trial, and that every effort is being made for the appellant to be examined by a doctor with a view to his being certified as a person of unsound mind.

I therefore allowed the appeal and quashed the conviction.

Appeal allowed

HASSAN BIN ISAHAK v. PUBLIC PROSECUTOR

[A. Cr. J. (Pretheroe Ag. C.J., Jobling and Hill JJ.) June 17, 1948]

[Penang — Criminal Reference No. 1 of 1948]

Criminal Procedure Code (Cap. 21), ss. 139, 176 & 448 — Charge in the alternative for offences contrary to ss. 177 & 181 of the Penal Code — Want of sanction — Whether curable under s. 448 of the Criminal Procedure Code — Plea of autrefois acquit.

Interpretation — Illustration to section.

The appellant in this case was charged in the alternative with committing offences contrary to sections 177 and 181 respectively of the Penal Code and the case originally came up for trial before the District Court Judge at Butterworth on July 24, 1947. After the evidence of the witnesses for the prosecution had been recorded the learned Judge realised that the requirements of section 139 of the Criminal Procedure Code had not been fulfilled. That section provides, *inter alia*, that no Court shall take cognizance of any offence punishable under sections 177 and 181 of the Penal Code except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate. In this case the Public Prosecutor had not given his previous sanction and the complaint was not made by the public servant concerned or by a public servant to whom he was subordinate. Before calling on the defence the learned District Court Judge terminated the proceedings and "released" the accused. The sanction of the Public Prosecutor was then obtained and the appellant was again charged in the alternative with committing the same offences as those before the Court on the 24th July. He pleaded *autrefois acquit*, but the plea was rejected and on October 6, 1947 he was convicted in the alternative of committing either an offence contrary to section 177 or contrary to section 181 of the Penal Code and sentenced to six months rigorous imprisonment. Appellant then appealed to the High Court against both conviction and sentence and the learned Judge of that Court sitting at Penang exercised his power under section 306(3) of the Criminal Procedure Code to reserve the hearing of the appeal for a Court of three Judges.

Held: (1) in the absence of the sanction of the Public Prosecutor, the proceedings in the District Court on July 24, 1947 were null and void and consequently the appellant was never in peril on that day; (2) section 176 of the Criminal Procedure Code is phrased in broad terms and clearly authorises alternative charges under different sections provided it is doubtful which offence the facts to be proved will constitute.

An illustration to a section cannot be used to restrict the plain and unambiguous wording of the section itself; it merely explains and does not qualify the section.

Cases referred to :—

(1) *R. v. Bates* (1911) 1 K.B. 964.

(2) *Mutha Moopan & Anor. v. R.* I.L.R. (1937) Mad. 664.

(3) *Ramamoorthy v. Public Prosecutor* (1948) M.L.J. 43.

(4) *Govindasamy v. Public Prosecutor* (1948) M.L.J. 46.

(5) *Nebti Mandal & Ors. v. R.* A.I.R. 1940 Pat. 289.

CRIMINAL REFERENCE.

Pretheroe A.C.J. delivering the judgment of the Court set out the facts as reproduced in the head-note above and continued : — The appeal came before this Court on the 11th of June last.

The first ground of appeal was that the appellant had previously been tried on identically the same charges and that his plea of *autrefois acquit* should have been accepted by the District Court Judge. For the appellant Mr. Conaghan admitted that, as the District Court Judge had discontinued the trial and released the appellant, he was unable to produce an order of the Court to support either as plea of *autrefois acquit* or *autrefois convict*. He maintained however that the action of the District Court Judge had been illegal and that in the circumstances of the first trial he should have acquitted the appellant. It was not disputed that had the fiat of the Attorney-General been a pre-requisite to such trial the absence of such fiat would have deprived the Court of jurisdiction (*R. v. Bates*[1]). Mr. Conaghan submitted, however, that the sanction required by section 139 of the Criminal Procedure Code is "less potent" than the fiat of the Attorney-General and that the absence of such sanction did not deprive the Court of jurisdiction and any proceeding of the Court in the absence of such sanction was merely an irregularity of procedure. In support of his submission Mr. Conaghan called in aid section 448(b) of the Criminal Procedure Code which provides that no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of ... "the want of any sanction required by section 139 of the Code". The latter part of the section qualifies the provision we have quoted, but it is certainly a strong argument to support the contention that want of sanction under

section 139 does not deprive the trial Court of jurisdiction.

A great weight of judicial decisions is however against this submission, and we are in agreement with those decisions. In our opinion the want of the prior sanction of the Public Prosecutor under section 139 deprives the Court of jurisdiction, and any proceedings in such circumstances are a nullity. We agree with the decision in *Mutha Moopan & Anor. v. R.*[2], and with the reasons given for arriving at that decision. Also it is significant that the provision in the Indian Criminal Procedure Code which was identical with section 448(b) of our Code was repealed in the year 1923. In our opinion that provision in our Code should also be repealed. From the foregoing it will be clear that the first ground of appeal fails because, in the absence of the sanction, the proceedings in the District Court on July 24th were null and void and consequently the appellant was never in peril on that day.

The second ground of appeal was that the appellant was wrongfully charged in the alternative. The authority for making charges in the alternative is section 176 of the Criminal Procedure Code. The wording of that section is comprehensive: it is subject to no provisoes and example (b) bears some resemblance to the charges in the present case. It was sought to distinguish that example from the present case firstly because in the example both statement were on oath and secondly both charges were under the same section. In our opinion an example cannot be used to restrict the plain and unambiguous wording of the section itself; it merely explains and does not qualify the section. The principles involved have recently been considered in two appeals to this Court viz: *Ramamoorthy v. Public Prosecutor*[3] and *Govindasamy v. Public Prosecutor*[4]. Those two cases differ from the present one in a single respect only; there both charges were under the same section while in this case they are under different sections. But section 176 is phrased in broad terms and in our opinion clearly authorises alternative charges under different sections provided it is doubtful which offence the facts to be proved will constitute.

The Indian Reports provide numerous precedents for charging offences under different sections in the alternative (*Nebti Mandal & Ors. v. R.*[5]).

It was also objected that two separate and distinct offences were charged in the alternative. But there is nothing in section 176 which restricts the "several offences" to offences of a similar nature. In the *Nebti Mandal*[5] *case* already cited the charges of murder and causing the disappearance of evidence of an offence were charged in the alternative and the appeal on this ground was dismissed. We therefore reject the second ground of appeal.

The third ground of appeal was that the appellant was wrongly convicted in the alternative. Section 270 of the Criminal Procedure Code provides that:—

> "When the conviction is under the Penal Code and it is doubtful under which of two sections or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative."

In this case it was impossible on the evidence for the District Court Judge to decide whether the statement made to the police officer was correct or whether the evidence before the Court was correct. In our opinion therefore he was rightly convicted in the alternative (see *Nebti Mandal & Ors. v. R.*[5]).

With regard to the sentence imposed, the appellant is a sergeant in the Police Force with some twenty-five years service to his credit. The maximum penalty to which he was liable on the conviction in the alternative was that prescribed by section 177 which, in the circumstances of this case, is two years imprisonment of either description. In our opinion the offence can only be regarded as a serious one which is aggravated by the fact that the offender is a member of the Police Force. We have therefore no hesitation in rejecting the appeal against sentence. The sentence will date from the day appellant surrenders to his bond.

Appeal dismissed.